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NOTE AND COMMENT

IS COMMERCE BETWEEN A STATE AND A TERRITORY INTERSTATE COMMERCE?—In the recent case of *United States* v. *Whelpley* (1903), 125 Fed R. 616, in the District Court, W. D. Virginia, MCDOWELL, D. J., holds that the statute of March 2, 1895, c. 191, 28 Stat. 963, U. S. Comp. St. 1901, p. 3178, reading: "That any person who shall cause to be . . . carried from one *state to another* in the United States, any . . . ticket . . . of a lottery . . . shall be punishable, etc.,"—being highly penal, should be strictly construed, and therefore does not forbid the carrying, for purposes of sale, of such a ticket from one state into the District of Columbia; in other words, that "state" here will be given its strict meaning, and will not include the District of Columbia, or any of the territories. The question was raised by a demurrer to the third count of an indictment of the defendant, charging him with the shipment of such tickets from Dayton, Va., to the District of Columbia, for the purpose of disposing of the same there. The same question came up in the case of *Champion* v. *Ames*, before JUDGE JENKINS, in the Circuit Court, N. D. Illinois, on a writ of *habeas corpus*, by C. F. Champion, to be released from an arrest for transporting, by the Wells, Fargo Express Co., certain lottery tickets from Texas to New Mexico, and was ruled the same way,—95 Fed. R. 453 (1899).

In the course of the opinion of JUDGE MCDOWELL, in the *Whelpley Case*, there is raised the much more interesting question as to the constitutional powers of Congress "To regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The judge states it thus: "Assuming the power of Congress to forbid shipments of lottery tickets (such being 'commerce,'—*Lottery Cases*, 188 U. S. 321, 23 Sup. Ct. 321,

47 L. Ed. 492), from the District of Columbia to a state or territory, or *from any territory to a state* or another territory, or to the District of Columbia, yet when the inhibition is against a shipment made *from a state to a territory*, or to the District of Columbia, there might seem to some minds to be reason to doubt the power of Congress."

Upon this point Messrs. Prentice and Egan, in their work upon "THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION," p. 60, say: "The business of transportation and the instrumentalities connected therewith, come within the control of Congress, when the traffic is 'among the several states,' and this phrase includes territories also,"—citing *Stoutenburgh* v. *Hennick*, 129 U. S. 141; *Ex parte Hanson*, 28 Fed. R. 127; *The Louisa Simpson*, 2 Sawy. 57. Likewise Mr. Tucker in "THE CONSTITUTION OF THE UNITED STATES," Vol. 2, p. 553, says: "This power to regulate commerce applies to the District of Columbia and the territories, as well as to the states. This is obvious as to foreign commerce, but it is also applicable to commerce between the District or territories and the states, upon the same reasons which were urged by the court in respect to the imposition of the direct tax upon the District and territories in the case of *Loughborough* v. *Blake*," 5 Wheat. 517, and he cites *Stoutenburgh* v. *Hennick*, *supra*.

The constitution authorizes Congress to lay and collect taxes, duties, etc., which shall be uniform throughout the United States, but requires direct taxes to be laid, and representatives and such taxes to be apportioned, "*among the several states*," according to population. In the *Loughborough Case* it was held that notwithstanding these constitutional provisions, the taxing power extended to imposing a direct tax upon the people of the District of Columbia, and of the territories, although they had no representatives in Congress; that Congress might, or might not, extend such tax to the District or to the territories as its wisdom should determine; but if it did so extend such a tax, then it must be apportioned according to population. There seemed to be no reason why the taxing power should extend only among the *states*, simply because the states, alone, had representatives, who, like the taxes, were to be apportioned according to population; and it does not seem to us that the reasoning that held the taxing power, which was clearly *not limited* to the states, extended to the territories, is applicable to a power, which, in the grant, is "to regulate *among the states*."

In *Stoutenburgh* v. *Hennick* (1889), 129 U. S. 141, the question involved was the validity of an Act of the Legislative Assembly of the District of Columbia, requiring a license from persons engaging in trade within the District. It was claimed that such provision was a regulation of commerce, and exclusively within the power of Congress. MR. CHIEF JUSTICE FULLER held that the Act of Congress creating the legislative assembly of the District did not in fact grant such power, and that Congress could not constitutionally *delegate* such power to such legislative body, even if Congress had the power to regulate commerce between a state and the District, but there was no need of discussing this larger question.

The other two cases relied on by Prentice and Egan,—*Ex parte Hanson*, and *The Louisa Simpson*, are decisions of JUDGE DEADY, of the United States District Court of Oregon. Several cases involving similar questions came before and were discussed by that excellent judge. In 1861, in *The*

Panama, Deady, 27, he held that the Act of 1789 (1 St. 54), granting power to the *states* to pass pilot laws, possibly gave such power to the territories also; but in any event the Act of Congress organizing the territory of Washington (10 St. 172), giving the legislature power over "all rightful subjects of legislation," included power to pass pilotage laws. In 1865, *In re Bryant*, 1 Deady, 118, he held that "*state*" in the Act (1 St. 134), for the government of seamen in the merchant service, included the *territories*. In 1871, in *The Louisa Simpson*, 2 Sawyer 57, he held that Congress had power to authorize the President to regulate or prohibit the introduction of distilled spirits into Alaska, as prescribed by the Act of 1868 (15 St 241). This decision was affirmed by the Circuit Court, SAWYER, C. J. In 1884, JUDGE DEADY, in *The Ullock*, 9 Sawy. 634, 19 Fed. 207, held that "*state*" in the Act of 1837 (5 St. 153, § 4236 R. S.) regulating pilots on waters between two states, includes an organized *territory* of the United States; the same holding was also made by the same judge in 1886 in *The Abercorn*, 26 Fed. 877. However, in *Ex parte Hanson* (1886), 28 Fed. 127, the question as to the power of Congress was more specifically raised, and is thus disposed of by JUDGE DEADY: "The latter [a territory] is a *state*, or collection of persons occupying a certain territory, with a legislative and executive organization,—in the large and general sense of the word (citing *In re Bryant*, *The Ullock*, and *The Abercorn*, *supra*). But a territory is not a member of the Union formed by the constitution, and 'the several states' referred to therein, among whom Congress may regulate commerce, are only those embraced in such Union. Congress has power to regulate commerce in the territories by virtue of its general power over them. But it has no power over the internal commerce of a state, and its power over the external commerce thereof is apparently qualified by the condition that it is with a foreign state, a state of the Union, or an Indian tribe, in which category the territory of Washington is not included." So it seems that JUDGE DEADY'S mature view was against the power of Congress.

In the recent case of *Hanley* v. *Kansas City S. R. Co.* (1903), 187 U. S. 617, 47 L. Ed. 333, Mr. JUSTICE HOLMES says: "It may be assumed that the power of Congress over commerce between Arkansas and the Indian Territory is not less than its power over commerce among the states,"—citing *Stoutenburgh* v. *Hennick*, *supra*,—but, he adds, "the distinction is hardly important since the appellants are asserting similar authority where the road beyond the state boundary runs through the state of Texas." The question involved was whether the rates fixed by the Arkansas Railroad Commissioners could apply to shipments made from a place in Arkansas to another place in the same state, over a railroad of which 28 miles were in Arkansas, then 128 in Indian Territory, then 117 again in Arkansas, and then on into Texas. It was held that the commissioners did not have jurisdiction.

It has been held that the District of Columbia is a municipal corporation that can sue and be sued, (*Metropolitan R. R.* v. *District of Columbia*, (1889), 132 U. S. 1, 9, 10 Sup. Ct. 19, 32 L. Ed. 231), and that it is a "*state*" within the meaning of Art. 79, of the Consular Convention of February 23 1853, with France, allowing a French alien to take property within the district by descent from a citizen of the United States. Also that the provisions of Sec. 5219 R. S., concerning the taxation of shares of National Bank stock

by the *states* apply to the territories also. (*Talbott* v. *Silver Bow County* (1891), 139 U. S. 444, 11 Sup. Ct. 594, 35 L. Ed. 210).

The foregoing seem to be the leading views upon this side. There is, however, considerable authority for a different view. JUDGE JENKINS, in his decision in *Champion* v. *Ames*, 95 Fed. R. 453, held that the word *state* in the lottery statute did not include territory, because *state* was used in its strict constitutional sense, relying upon an unbroken line of decisions beginning with *Hepburn* v. *Ellzey*, 2 Cranch 445, decided by CHIEF JUSTICE MARSHALL in 1805. The constitution provides that the judicial power of the United States courts shall extend "to controversies between citizens of different states" (Art. iii., sec. 2), and the question involved was whether the federal courts had jurisdiction of a controversy between a citizen of one state and a citizen of the District of Columbia. *Held*, not,—the Chief Justice saying, "The District of Columbia is a distinct political society, and is therefore a 'state,' according to the definitions of writers on general law. . . . But as the Act of Congress obviously uses the word 'state' in reference to that term as used in the constitution, it becomes necessary to inquire whether Columbia is a state in the sense of that instrument," and after observing that the "people of the states" choose Congressmen, there are Senators "from each state," "each state" chooses electors, etc., concluded the word *state* had a limited meaning in the constitution. He, however, also said, "it is extraordinary that the courts of the United States, which are open to aliens, and to citizens of every state in the Union, should be closed upon these [citizens of the District]. But this is a subject for legislation, not for judicial consideration." In the subsequent case of *City of New Orleans* v. *Winter*, 1 Wheat. 91, 4 L. Ed. 44, the same judge in 1816, extended the same doctrine to the territories, and this has remained the rule since. *Barney* v. *Baltimore City* (1867), 6 Wall 280, 18 L. Ed. 825; *Snead* v. *Sellers* (1894), 66 Fed. R. 371, 13 C. C. A. 518; *Hooe* v. *Jamieson* (1897), 166 U. S. 395, 17 Sup. Ct. 596, 41 L. Ed. 1049; *Weller* v. *Hanaur* (1900), 105 Fed. R. 193; *Watson* v. *Bonfils* (1902), 116 Fed. R. 157.

In the *Trademark Cases*, 100 U. S. 82, 96, 25 L. Ed. 550, Mr. JUSTICE MILLER observed that if an Act of Congress which can only be valid as a regulation of commerce, does not on its face, or from its essential nature, limit itself to a regulation of commerce with foreign nations, or among the several states, or with the Indian tribes, "it is in excess of the power of Congress;" and in his dissenting opinion in *Stoutenburgh* v. *Hennick*, *supra*, he said, "Commerce between a citizen of Baltimore and citizens of the District of Columbia is not commerce 'among the several states,' and is not commerce between citizens of different states in any sense. Commerce by a citizen of one state, in order to come within the constitutional provision, must be commerce with a citizen of another state; and when one of the parties is a citizen of a territory, or of the District of Columbia, or of any other place out of a state of the Union, it is not commerce among the citizens of the several states."

In the "*Insular Cases*," 1901, 182 U. S. 1, 222, 243, 244, 392, these matters were more or less discussed, and in the one involving the most important principles, *Downes* v. *Bidwell*, 182 U. S. 244, MR. JUSTICE BROWN, after announcing the decision of the majority of the Court, rendered an opinion with which none of the other judges fully concurred, in which he said, (p. 270)

that the "District of Columbia and the territories are not states, within the judicial clause of the Constitution giving jurisdiction in cases between citizens of different states;" nor within Sec. 709 R. S., permitting writs of error from the Supreme Court where the validity of a *state* statute is in question; but they are "states as that word is used in treaties with foreign powers, with respect to the ownership, disposition, and inheritance of property."

Section 1 of the "Act to Regulate Commerce," February 4, 1887, c. 104, 24 St. 379, 3 Comp. St. 1901, p. 3154, and Section 3, of the Anti-Trust Act, July 2, 1890, c. 647, 26 St. 209, 3 Comp. St. 1901, p. 3201, apply to commerce between the states and territories, as well as "among the states." In view of the foregoing diversity of opinion of the extent of the power of Congress under the "Commerce Clause," it is uncertain whether these sections are valid or not.

RIGHT OF COURT TO INSTRUCT UPON THE FAILURE OF DEFENDANT TO TESTIFY IN A CRIMINAL ACTION.—The Court of Appeals of Kentucky has recently delivered a somewhat peculiar and novel opinion, relating to the right of the court to give an instruction based upon the failure of a defendant to testify in a criminal action. The defendant was charged with a felony and did not testify in his own behalf. The trial judge, without request, instructed the jury, that they should not comment upon such failure to testify, nor should they draw any presumption of guilt therefrom. This instruction was held to be reversible error. *Tines* v. *Commonwealth* (1903), 77 S. W. Rep. 363.

The Criminal Code of Kentucky, Sec. 223, provides that the failure of a defendant to testify in his own behalf, "shall not be commented upon, or be allowed to create any presumption against him." In holding the instruction erroneous, the court, citing no authority, says:—"The jury's mind was thus directed to the fact that appellant had not testified in his own behalf, and no comment by the commonwealth's attorney could have been more injurious to his interest than this instruction. The court, by the instruction in question, did the appellant the very injury which it is the object of the law to prevent. Appellant was entitled to absolute silence on his failure to testify in his own behalf." Only two cases seem to have gone to the limit of holding that the trial judge must keep absolutely silent on this subject. In *State* v. *Robinson*, 117 Mo. 649, 23 S. W. 1066, and *State* v. *Pearce*, 56 Minn. 226, 57 N. W. 652, the defendants requested the instructions, which were refused because the statutes of these states expressly forbade not only the attorneys but the courts from commenting upon or considering the failure to testify. But in Kansas, under a statute identical with those of Missouri and Minnesota, a different conclusion has been reached. DOSTER, J., in a recent well-considered and logical opinion, says that the statute was made for the purpose of protecting the rights of the defendant, and means that there shall be no consideration to his prejudice. He points out that in the absence of any instruction as to the duty of the jury under the law, they might consider the failure and comment upon it to the prejudice of the defendant. *State* v. *Goff*, 62 Kan. 104, 61 Pac. 683. This latter point, which is certainly very important, has been lost sight of by the Kentucky court, as well as by those of Missouri and Minnesota. In *Sullivan* v. *State*, 9 Ohio Cir. Ct. 652, the court says:—"If the court, *sua sponte*, were to charge the jury to do what the law requires